

VIA ECFS

EX PARTE

June 23, 2009

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

**Re: *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance
Under Section 10 of the Communications Act of 1934, as Amended,
WC Docket No. 07-267***

Dear Ms. Dortch:

Earlier today, Julia Strow, Vice President of EAS Consulting, Inc. and an outside consultant to Cbeyond, Inc. and One Communications Corp., Russ Merbeth, Federal Counsel, Law & Policy, for Integra Telecom, Inc., and the undersigned met with Scott Deutchman, Legal Advisor to Acting Chairman Copps, regarding the above-referenced proceeding.

The participants urged the Commission to adopt the procedural and substantive rules described in the attached document, which was distributed at the meeting.

Please do not hesitate to contact me if you have any questions or concerns about this submission.

Respectfully submitted,

/s/ Thomas Jones

Thomas Jones

Nirali Patel

*Counsel for Cbeyond, Inc., Integra Telecom, Inc.,
One Communications Corp. and tw telecom inc.*

cc (via email): Scott Deutchman

Presentation on Behalf of Cbeyond, Integra, One Communications, and tw telecom
Regarding Procedural Rules to Govern Forbearance Proceedings
WC Dkt. No. 07-267

- I. THE FCC SHOULD ESTABLISH A RULE PROVIDING THAT THE PETITIONER BEARS THE BURDEN OF PROVING THAT THE CRITERIA OF SECTION 10(A) ARE SATISFIED.
- Section 10(a) of the Act requires the FCC to “determine[]” whether forbearance should be granted. Congress did not define that ambiguous term in Section 10 and, therefore, a Commission rule requiring that the petitioner bear the burden of proof would be entitled to *Chevron* deference.
 - In carrying out other sections of the Act which require it to make a “determination,” the Commission has required the petitioner or complainant to bear the burden of proof. For example, in implementing Section 271(d)(3), which provides that “the Commission shall issue a written determination approving or denying” Section 271 applications, the FCC has explicitly required applicants to bear the burden of proof. *See Section 271 Public Notice*, DA 01-734, at 3 (rel. Mar. 23, 2001).
- II. THE FCC SHOULD ESTABLISH RULES THAT ENSURE AN ORDERLY, PREDICTABLE PROCESS FOR THE SUBMISSION OF INFORMATION IN FORBEARANCE PROCEEDINGS.
- A petitioner should be required to submit with its petition all information in its possession that it intends to rely on in support of the requested relief, except that a petitioner may subsequently file additional information (1) for the purpose of responding to specific arguments made by opponents of the petition, and (2) to update previously filed information. A petitioner should be permitted to update previously filed information for up to 9 months after the initial filing, after which time the petitioner should be prohibited from updating its information.
 - No party should be permitted to file any ex partes in a forbearance proceeding within 30 days of the one-year statutory deadline or the one-year plus 90-day deadline if the original deadline has been extended by the Commission.
- III. IN THE NORMAL COURSE, THE FCC SHOULD RULE ON FORBEARANCE PETITIONS WITHIN ONE YEAR.
- This is what Congress contemplated when it imposed a one-year statutory deadline in Section 10(c).
 - Verizon’s proposal that “the target should be 90 days to resolve a petition” (*see* Verizon June 4, 2009 *Ex Parte* Letter) is completely arbitrary and inconsistent with the one-year initial statutory deadline. The 90-day proposal is also unworkable given that a typical comment cycle is at least 60 days. Obviously, the FCC should rule on

forbearance petitions as expeditiously as possible, but it is not necessary for the Commission to bind itself to an arbitrary shot clock that is short of the timeframe established by Congress.

IV. THE FCC SHOULD ADOPT PROCEDURAL AND SUBSTANTIVE RULES GOVERNING REQUESTS TO WITHDRAW FORBEARANCE PETITIONS.

- The Commission should adopt a rule that requires a party seeking to withdraw a forbearance petition to file a formal request for withdrawal. The FCC has the authority to establish such a rule under Sections 4(i) and 303(r) of the Act, which permit the agency to prescribe rules as may be necessary to carry out Section 10.
- The Commission should also set forth criteria for reviewing withdrawal requests.
 - Factors that weigh in favor of denying a withdrawal request include the interest in resolving the issues raised in a forbearance proceeding, especially where both agency and industry resources have been expended in examining such issues, and the interest in developing a jurisprudence that provides industry with guidance on the types of markets in which forbearance may be granted in the future.
 - Factors that weigh in favor of accepting a withdrawal request include the hardship that the petitioner would experience if the proceeding were to continue (such hardship should not be of the petitioner's own making).
- There should be a presumption against accepting withdrawal requests within 90 days of the one-year statutory deadline for the petition at issue or after the circulation of a draft Order on the petition, whichever is sooner.

V. THE FCC SHOULD INTERPRET THE TERM "DENY" IN SECTION 10(C) TO MEAN THAT A TIMELY 2-2 DEADLOCKED VOTE CONSTITUTES A DENIAL OF THE PORTION OF THE REQUESTED RELIEF OVER WHICH THERE IS A DEADLOCK.

- The DC Circuit's decision in *Sprint Nextel v. FCC* does not preclude the FCC from adopting an internal voting rule to this effect. While the court found that the Commission had made "the implicit decision to treat the vote [on Verizon's broadband forbearance petition] as a failure to deny the petition," it said nothing about the Commission's ability to adopt an internal voting procedure which explicitly treats a deadlocked vote as a denial. Indeed, the term "deny" in Section 10 is ambiguous and the FCC's interpretation of that term is entitled to *Chevron* deference.

- Examples of how a four-member Commission would apply this internal voting rule include:
 - Example 1: Where there is a timely 2-2 deadlocked vote over whether to grant any of the relief requested in a forbearance petition, all of the relief requested would be denied.
 - Example 2: Where the petitioner has requested forbearance from Regulations 1 through 3 and a majority of Commissioners timely vote to grant forbearance from Regulations 1 and 2, but there is a timely 2-2 deadlocked vote over whether to grant forbearance from Regulation 3, forbearance from Regulations 1 and 2 would be granted and forbearance from Regulation 3 would be denied.
 - Example 3: Where two Commissioners timely vote to grant all of the forbearance relief requested and the other two Commissioners vote to grant all of the relief requested only if such grant is subject to certain conditions, all of the forbearance relief requested would be denied.
- Internal FCC voting procedures already permit Commissioners to approve in part and dissent in part on an Order. For example, of the five members of the Commission that voted on the *TRO*, the Chairman and three other Commissioners approved in part and dissented in part.
- In all cases in which a timely vote is taken, the Commission must release an order explaining its decision. Where a 2-2 vote occurs for all or part of the requested relief, the portion of the order explaining the denial of such requested relief would be drafted at the direction of the Commissioners voting in favor of denial.